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DOCKET NO. 03-1284

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

JAMES V. CROSBY, SECRETARY,
DEPARTMENT OF CORRECTIONS, FLORIDA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise certiorari jurisdiction to review the denial of a state motion for post-conviction relief based on a matter of state law, where the claim was not timely raised in state court, the ruling does not conflict with any other court opinion or address any unsettled question of federal constitution law, and exercising jurisdiction would require retroactive application of a new rule of constitutional law?

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Respondent.

CITATION TO OPINION BELOW

The Florida Supreme Court's decision in Herring's state habeas corpus proceeding is an order issued on December 10, 2003. *Pet. App.* 10a. The Respondents' Answer to the petition for writ of habeas corpus, which raised a state procedural bar to consideration of the claim contained in the petition for writ of certiorari, is attached as Respondent's Appendix A.

STATEMENT OF JURISDICTION

Herring asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondents agree that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but respectfully submits that this case is inappropriate for the exercise of the Court's discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

In the body of his petition, Herring asserts that the Sixth and Fourteenth Amendments to the Constitution of the United States are at issue in this proceeding. Herring also asserts that §775.082 and § 921.141 of the *Florida Statutes* are at issue. Those provisions of the *Florida Statutes* set out the capital sentencing scheme that has been repeatedly upheld by this Court.

In addition to the foregoing constitutional and statutory provisions which are involved in this case, Herring has also set out the Fifth and Eighth Amendments to the Constitution of the United States in the Appendix to his petition. If inclusion of those authorities is intended to also invoke those Amendments, Respondents respectfully suggest that those provisions have nothing to do with this case. The only issue contained in Herring's petition is based on *Ring v. Arizona,* 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (which are based expressly on the Sixth Amendment) -- Respondents respectfully suggest that the Fifth and Eighth Amendments have nothing to do with this proceeding.

STATEMENT OF THE CASE

On pages 1-5 of the petition, Herring sets out an argumentative and largely irrelevant discussion of the history of this case. The Respondents rely on the following statement of the facts of this case, which is taken from the Florida Supreme Court's 1984 decision in his case:

> Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:
>
> > This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].
>
> A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.
>
> Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was

interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's. At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the

> imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Herring v. State, 440 So. 2d 1049, 1051-53 (Fla.), *cert. denied*, 469 U.S. 989 (1984).[1]

Herring has filed various other collateral attack proceedings challenging his conviction and sentence, but the only one relevant to this proceeding is the state petition for writ of habeas corpus he filed in the Florida Supreme Court on or about June 23, 2003. The Florida Supreme Court denied relief on that petition on December 10, 2003. *Pet. App.* 10a.[2] Herring filed his petition for a writ of certiorari on March 8, 2004.

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[1]The Florida Supreme Court subsequently receded from the application of the cold, calculated and premeditated aggravator to the facts of this case. *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988). That matter is not before this Court.

[2]At this time, Herring has a post-conviction motion pending in the Circuit Court of Volusia County, Florida, as well as an appeal from the denial of his Federal habeas corpus petition pending in the United States Court of Appeals for the Eleventh Circuit. Those proceedings do not implicate the issue contained in this petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE *RING V. ARIZONA* CLAIM WAS NOT PRESENTED TO THE STATE COURTS IN A TIMELY FASHION, AND IS PROCEDURALLY BARRED UNDER FLORIDA LAW.

This claim is inappropriate for the exercise of this Court's discretionary jurisdiction because, the *Ring/Apprendi* claim could have been, but was not, timely raised in the state courts. (App. A). This claim has been available since this Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), when this Court held that the Constitution does not require jury sentencing. The basis of the *Ring/Apprendi* claim has been available to Herring since the time he was sentenced to death, but was not raised as a basis for relief until his 2003 state habeas corpus petition. Because that is so, this claim is procedurally barred under settled Florida law, and, consequently, has never been properly presented to the State courts for decision.

Because this claim was not timely raised below, it is inappropriate for the exercise of this Court's certiorari jurisdiction. *Adams v. Robertson*, 520 U.S. 83 (1997); *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996) ("generally [we] do not address arguments that were not the basis for the decision below."); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). To the extent that Herring may argue that the Florida Supreme Court's order denying relief does not explicitly rest on State procedural bar grounds, the Respondents suggest that the procedural bar defense was clearly asserted in the answer to the habeas corpus petition, and that this Court should not presume that, by silence, the State Court ignored its own procedural rules. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). This Court should decline to exercise its certiorari jurisdiction to entertain this claim.

II. THE *RING* CLAIM WAS CORRECTLY DECIDED BY THE STATE COURT BASED UPON THE APPLICATION OF STATE LAW.

The law is well-settled that the State courts are the final arbiters of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (this Court "repeatedly has held that state courts are the ultimate expositors of state law ... and that we are bound by their constructions except in extreme circumstances."). While Herring claims that Florida law is to the contrary (*Petition*, at 8), the Florida Supreme Court has explicitly held that the maximum sentence exposure following conviction of a capital felony is death:

> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in para materia* with section 921.141, *Florida Statutes*, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.

Mills v. Moore, 786 So. 2d 532, 538 (Fla.), *cert. denied,* 523 U.S. 1015 (2001). The Florida Supreme Court has consistently interpreted Florida's capital sentencing statute in that way, both before and after *Ring* was decided. *See, Shere v. Moore*, 830 So. 2d 56 (Fla. 2002) (holding that a Florida defendant is **eligible** for a death sentence on **conviction** of a capital felony); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067 (2002). Because that is the law in Florida, Herring's reliance on decisions from other state courts is misplaced -- it does not matter what interpretation another state supreme court has placed on its particular statute because only the Florida Supreme Court can make a binding interpretation of Florida law. There is no conflict between Courts, nor can there be.[3] The

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[3]In his effort to create a "conflict" among courts, Herring points to decisions from Missouri, Colorado, and Nevada. Significantly, he makes no mention of any decisions from Alabama, Indiana, and Delaware, the other three "hybrid" states which this Court grouped with Florida in *Ring*. *Ring*, 536 U.S. at 608, n.6.

Florida Supreme Court correctly decided the *Apprendi/Ring* issue, and this Court should decline to exercise its certiorari jurisdiction. *See, Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n.3 (1987) (cases that have not divided the courts or presented important, unsettled questions of federal law usually do not merit certiorari review).

III. *RING* DOES NOT INVALIDATE THE FLORIDA DEATH PENALTY STATUTE, DOES NOT REQUIRE JURY SENTENCING, AND DOES NOT SUPPLY A BASIS FOR REVERSAL OF HERRING'S DEATH SENTENCE.

Ring v. Arizona did not invalidate the Florida death penalty statute, and does not provide a basis for reversal of Herring's death sentence. In *Apprendi*, this Court announced the rule that "any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Ring*, this Court extended *Apprendi* to Arizona's capital sentencing scheme and found that **Arizona's** scheme violated the Sixth Amendment because it allowed a trial judge, sitting without a jury, to find an aggravating circumstance **necessary** for the imposition of the death penalty. *Ring*, 536 U.S. at 609. However, in *Mills v. Moore, supra*, which was decided prior to *Ring*, the Florida Supreme Court did not apply *Apprendi* to Florida's capital sentencing scheme, because, even if *Apprendi* **did** apply to capital sentencing, **the maximum penalty for first degree murder in Florida (unlike Arizona) is death.** *Mills*, 786 So. 2d at 536-38.

Shortly after this Court overturned *Walton v. Arizona*, 497 U.S. 639 (1990) in *Ring v. Arizona*, 536 U.S. 584 (2002), the Florida Supreme Court stayed active death warrants in two capital cases, purportedly to assess the impact of *Ring* to its prior *Mills* decision. On October 24, 2002, the Florida Supreme Court issued opinions in these two cases and upheld Florida's statutory capital scheme against an attack based on *Ring*. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). The Florida

Supreme Court's conclusion that death is the maximum sentence for first degree murder in Florida is not called into question by this Court's *Ring* or *Apprendi* decisions, neither of which overruled prior decisions by this Court rejecting constitutional challenges to Florida's capital sentencing procedures. *See, e.g., Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

Herring also argues that *Apprendi* and *Ring* apply to Florida's capital sentencing procedures because, under Florida law, a death sentence may not be imposed unless a trial judge acting independently of the jury makes findings of fact in support of an aggravating factor. *Mills* is the law in Florida, and clearly distinguishes between the death eligibility determination (which is made at the guilt stage proceeding) and the death **selection** stage, which takes place at the penalty stage of a Florida capital trial. In *Mills* and *Shere,* the Florida Supreme Court made it clear that, under Florida law, the defendant is death **eligible** on conviction for first degree murder -- it is during the penalty phase that the sentence determination is made.[4]

Although Petitioner claims that *Ring* applies to Florida, *Ring* is merely the application of the holding in *Apprendi* to Arizona's capital scheme. Clearly, the application of *Apprendi* was limited to factual findings, other than a prior conviction, which **increase** the statutory maximum for a charged offense. Because the Arizona Supreme Court interpreted its state law as prescribing only a life sentence upon conviction for first degree murder, *Ring*, 536 U.S. at 595-96; *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001), *Ring* fits squarely within the *Apprendi* holding, - - *Ring* does not, however, extend or expand the Sixth Amendment right at issue in *Apprendi.*

Although *Ring* applied *Apprendi* to Arizona's capital sentencing law and recognized that *Walton* had misinterpreted Arizona law, it did not cast doubt on the Florida Supreme Court's conclusion (in *Mills* and later cases) that *Apprendi* and *Ring* were not implicated

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[4]Stated in slightly different terms, at the penalty (sentence) stage, the choice is made between death or life imprisonment -- **both** are sentences for which the defendant is **eligible** by virtue of his conviction.

under Florida's death penalty statute.[5] The plain language of *Apprendi* and *Ring* establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. The Florida Supreme Court has clearly held that under Florida law death ok the statutory maximum for first degree murder. Because that is so, Herring was death-eligible based upon his **conviction** for first degree murder -- *Ring* is inapplicable to Florida's death sentencing scheme, and does not make Herring's death sentence or Florida's sentencing scheme unconstitutional.

Contrary to Herring's position, *Ring* proves only that the Florida Supreme Court was correct, because *Apprendi* (and more importantly, *Ring*) does not require jury sentencing. As Justice Scalia stated in concurrence (joined by Justice Thomas), this Court's decision in *Ring* **"has nothing to do with jury sentencing."** *Ring*, 536 U.S. at 612 (Scalia, J., concurring) [emphasis added]. *Apprendi* and *Ring* involve the jury's role in determining death eligibility, and, once that determination is made (as it is at the guilt stage by a Florida jury), there is no further constitutional issue because *Apprendi* and *Ring* do not require that a jury perform the actual *selection* of sentence. Relying directly on *Proffitt*, 428 U.S. at 252, *Ring* acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required." *See also Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution permits the trial judge, acting alone, to impose a capital sentence and is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight). *Ring* involves only the requirement that the jury find the defendant death-eligible, and the Florida statute complies with that constitutional mandate. *Ring*, 536 U.S. at 597 n.4. The actual sentencing decision may constitutionally be made by the trial court. *See Spaziano*, 468 U.S. at 459 (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

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[5]The error in *Walton*, which was corrected in *Ring*, was in interpreting the **Arizona** death sentencing statute as making the death eligibility determination at the guilt stage of a capital trial. The Arizona Supreme Court interpreted the statute to the contrary. *Walton* made no error in the interpretation of Florida law, which has always determined death eligibility at the guilt stage.

Aggravating factors in Florida are not elements of the offense, but are capital sentencing guidelines which channel the sentencer's discretion for Eighth Amendment purposes (which have nothing to do with the Sixth Amendment issues driving *Ring* and *Apprendi*). *See Bottoson v. Moore*, 833 So. 2d 693, 729 (Fla. 2002) ("Given the operation of Florida's statutory scheme, aggravating factors should not be considered elements, nor . . . are they the functional equivalent of elements of a greater offense such that *Ring* would require that they be found unanimously by a jury.") (Lewis, J., concurring). Florida's capital sentencing scheme (§921.141, *Florida Statutes*) sets out guidelines for the sentencer to follow in evaluating the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Because a defendant is eligible for the statutory maximum sentence of death upon conviction of first degree murder, further proceedings to evaluate and assess the sentencing selection factors clearly do not violate due process. The sentencer may constitutionally be given discretion in determining the appropriate sentence (which, in the case of a capital conviction, is either life or death) so long as the jury has decided that the defendant is eligible for the death penalty. That is what Florida law provides, and, therefore, *Ring* and *Apprendi* have no impact on the constitutionality of Florida's sentencing statute.

Apprendi and *Ring* hold that any fact that increases the penalty **beyond** the statutory maximum must be determined by the jury -- however, since the Florida Supreme Court has clearly held that death is the maximum punishment for first degree murder, the penalty (or sentence exposure) is not increased by the subsequent finding of aggravators. The aggravators are constitutionally mandated guidelines (or sentence selection criteria) which exist to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences -- they are not elements of the crime, and they have nothing to do with the *Apprendi/Ring* analysis.

To the extent that it is relevant, the Florida Supreme Court has held that the jury's advisory sentence need not be unanimous. *See Way v. State*, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's death recommendation need not be unanimous);

Thompson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote of death is constitutional); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975) (same). The issuance of *Apprendi* and *Ring* has not changed anything. *Card v. State*, 803 So. 2d 613, 628 n.13 (Fla. 2001) (rejecting claim that *Apprendi* requires unanimous jury recommendation; "capital jury may recommend a death sentence by a bare majority vote"); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001) (same); *Looney v. State*, 803 So. 2d 656, 675 (Fla. 2001) (same); *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001) (rejecting argument that aggravators must be found by unanimous jury).[6]

Finally, *Ring* did not overrule the numerous cases where this Court upheld Florida's capital sentencing against constitutional challenges. *See Hildwin*, 490 U.S. at 640-41 (stating that case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); *Proffitt*, 428 U.S. at 252 (holding Constitution does not require jury sentencing); *Spaziano* , 468 U.S. at 459 (same). This Court has clearly stated, "[w]e reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Neither *Apprendi* nor *Ring* has implicitly overruled the above cases which have repeatedly upheld Florida's death penalty act.

The Florida Supreme Court's opinions in *Bottoson* and *King* recognize and respect the position that this Court has the prerogative of overruling its own decisions. Although each of the Florida

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[6]Of course, unanimity requirements with respect to mitigating factors has been rejected by this Court. *McKoy v. North Carolina*, 494 U.S. 433 (1990) (determining that requirement of unanimous findings of mitigators is unconstitutional); *Mills v. Maryland*, 486 U.S. 367 (1988) (same).

Supreme Court's justices wrote separate concurring opinions in *Bottoson* and *King*, the court unanimously determined that *Ring* did not entitle the defendants to relief. The Florida Supreme Court has continuously followed this precedent and denied relief based on *Ring*. *See Robinson v. State & Crosby*, 865 So. 2d 1259 (Fla. 2004), *cert. denied*, 124 S.Ct. 1197 (2004); *Parker v. State*, 29 Fla. L. Weekly S27 (Fla. Jan 22, 2004); *Davis v. State*, 28 Fla. L. Weekly S835 (Fla. Nov. 20, 2003); *Guzman v. State*, 28 Fla. L. Weekly S829 (Fla. Nov. 20, 2003); *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003); *Johnston v. State*, 863 So. 2d 271 (Fla. 2003), *cert. denied*, 2004 WL 180326 (U.S. Mar. 22, 2004); *Cummings-El v. State/Crosby*, 863 So. 2d 246 (Fla. 2003); *Anderson v. State*, 863 So. 2d 169 (Fla. 2003), *cert. denied*, 2004 WL 547148 (U.S. Mar. 22, 2004); *Owen v. State*, 862 So. 2d 687 (Fla. 2003), *Petition for cert. filed*, Case. No. 03-9345, (U.S. Mar. 4, 2004); *Henry v. State*, 862 So. 2d 679 (Fla. 2003); *Rivera v. State/Crosby*, 859 So. 2d 495 (Fla. 2003); *Davis v. State*, 859 So. 2d 465 (Fla. 2003); *Marquard v. State*, 850 So. 2d 417, 431 n.12 (Fla. 2002); *Lugo v. State*, 845 So. 2d 74, 119 (Fla.), *cert. denied*, 124 S.Ct. 320 (2003); *Kormondy v. State*, 845 So. 2d 41 (Fla.), *cert. denied*, 124 S.Ct. 392 (2003); *Spencer v. State/Crosby*, 842 So. 2d 52 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla.), *cert. denied*, 124 S.Ct. 408 (2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *cert. denied*, 124 S.Ct. 100 (2003); *Doorbal v. State*, 837 So. 2d 940 (Fla.), *cert. denied*, 123 S.Ct 2647 (2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002).

Herring became eligible for the death penalty upon his conviction for first degree murder, and the jury determined that the appropriate sentence was death upon consideration of sentencing selection factors. Petitioner cannot demonstrate that Florida law is constitutionally inadequate under existing precedent. Finally, even if this Court were to recede from all its previous Sixth and Eighth Amendment decisions upholding Florida's capital sentencing procedures, Herring is not entitled to relief under *Ring* as he has previously been convicted of another violent felony (robbery with a

firearm) in addition to being convicted of the robbery during which the murder occurred (thereby establishing the murder during the course of an enumerated felony aggravator) -- those aggravators clearly fall outside the scope of *Apprendi/Ring*. This Court should deny the petition for writ of certiorari.

IV. CERTIORARI REVIEW IS INAPPROPRIATE BECAUSE HERRING SEEKS THE APPLICATION OF A NEW RULE OF CONSTITUTIONAL LAW IN A COLLATERAL PROCEEDING.

Finally, this Court should decline to exercise its discretionary jurisdiction because Herring is seeking retroactive application of a new rule of constitutional law to his conviction and sentence, which have been final since 1984. In *Teague v. Lane*, 489 U.S. 288, 298 (1989), this Court noted that retroactivity is "properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Herring fails to address the threshold question of the retroactive application of *Ring* to his conviction and sentence. Instead, Herring asserts that this "Court need not address retroactivity in considering the petition" because the state habeas corpus petition "was governed by the test for determining retroactivity under Florida law." *Petition*, at 17. That argument confuses the nature of this proceeding and the standard by which this Court decides the retroactivity question.[7]

Neither this Court nor the Florida Supreme Court has directly

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[7]Herring's plea to be allowed to litigate the retroactivity issue in state court under the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), standard ignores and devalues this Court's role. This Court decides retroactivity questions based on *Teague*, and, given that the State court proceeding is final for all purposes, Herring cannot "reopen" the retroactivity issue in state court.

addressed retroactivity of either *Ring*[8] or *Apprendi*[9]; however, the Texas Court of Criminal Appeals recently held *Ring* is not retroactive. *Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199 (Feb. 11, 2004). The two federal circuit courts of appeal that have directly addressed whether *Ring* may be retroactively applied, in terms relevant here, have split on this issue.[10] In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit Court of Appeals, in reviewing a Florida conviction and death sentence, ruled that Turner could not collaterally attack his convictions and sentences on the basis of a *Ring* error because *Ring* did not apply retroactively. Shortly after the *Turner* decision issued, a different panel of the Eleventh Circuit ruled in *Ziegler v. Crosby*, 345 F.3d 1300 (11th Cir. 2003), that Zeigler's challenge to his Florida death sentence fails because neither *Apprendi* nor *Ring* applies retroactively on collateral review to convictions that became final before these cases were decided.

In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 833 (Dec. 1, 2003), the Ninth Circuit, in reviewing Arizona's capital sentencing structure, came to the opposite conclusion. Significantly, the Ninth Circuit's decision turned on its

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[8]Justice O'Connor in her dissent in *Ring* implied that *Ring* was not retroactive as she noted that capital defendants will be barred from taking advantage of the court's holding on federal collateral review. *Ring*, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting).

[9]This Court has held, however, that an *Apprendi* error is not plain error because failing to include the quantity of drugs in an indictment, while an *Apprendi* violation, did not affect the fairness, integrity or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625 (2002). If a found error is not of such magnitude as to constitute plain error, it follows that it is not of such fundamental significance as to warrant retroactivity. In *Harris v. United States*, 536 U.S. 545 (2002), Justice Thomas observed in his dissenting opinion that "[n]o Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect." *Harris*, 536 U.S. at 581. All eleven federal circuit courts of appeal have ruled that *Apprendi* is not to be retroactively applied.

[10]While other federal circuit courts of appeal have addressed *Ring's* retroactivity in terms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as applied to successive habeas corpus petitions, only two have directly addressed *Ring's* retroactivity in terms relevant here and in light of this Court's general retroactivity analysis as set forth in *Teague v. Lane*, 489 U.S. 288 (1989).

conclusion that the retroactive application of *Ring* was necessary to ensure the fairness of Arizona's capital sentencing scheme. In fact, the Court went so far as to conclude that application of *Ring* was necessary to "significantly improve the accuracy of capital trials in Arizona." *Summerlin*, 341 F.3d at 1115.

This is not the case, however, in Florida. In *Turner*, the Eleventh Circuit observed that Florida's pre-*Ring* capital sentencing procedure "does not diminish the likelihood of a fair sentencing hearing." The Court went on to note that "*Ring* is based on the Sixth Amendment right to a jury trial, not on a perceived, much less documented need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." *Turner*, 339 F.3d at 1286.[11] This Court has also refused to apply a Sixth Amendment right to jury trial retroactively when it could not be said that the fact-finding process is more fair or reliable when done by a jury rather than by a judge. *DeStefano v. Woods*, 392 U.S. 631 (1968).

Herring became eligible for the death penalty upon his conviction for first degree murder -- the jury determined that the appropriate sentence was death upon consideration of sentencing selection factors. The jury further determined unanimously that he was guilty of armed robbery, a factor which was determined to be an aggravating factor. Herring cannot demonstrate that Florida law is constitutionally inadequate under existing precedent. Even if this Court were to recede from all its previous Sixth and Eighth Amendment decisions upholding Florida's capital sentencing procedures, any error would be harmless in this case. Because certiorari review will not have any impact on the outcome of this case, this Court should deny Herring's petition.

Herring has failed to demonstrate that there are special or important reasons compelling certiorari review of his case -- the petition should be denied.

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[11]This ruling is consistent with this Court's observation in *Ring* that the right to a jury trial did not "turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring*, 536 U.S. at 607.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

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DOCKET NO. 03-1284

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

JAMES V. CROSBY, SECRETARY,
DEPARTMENT OF CORRECTIONS, FLORIDA
Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF FLORIDA

TED HERRING,
Petitioner,

Case No. SC03-1144

v.

JAMES V. CROSBY, JR.,
Secretary, Department
of Corrections, *et.al*,
Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW the Respondents, by and through the undersigned counsel, and respond as follows to Herring's petition for writ of habeas corpus. For the reasons set out herein, the petition should be denied in all respects -- likewise, there is no justification for oral argument in this case, and it should not be allowed.

RESPONSE TO JURISDICTION

Respondents agree that this Court has jurisdiction, under the *Rules of Appellate Procedure*, to entertain petitions for writs of habeas corpus.

RESPONSE TO "STATEMENT OF FACTS"

The "statement of facts" set out on pages 2-4 of the petition contains few facts relevant to the crimes for which Herring was convicted and sentenced to death, and, moreover, contains an argumentative dissertation on the shortcomings of Herring's 1985 *Florida Rule of Criminal Procedure* 3.850 proceeding. That case has been final for years, and may not be relitigated in this petition for writ of habeas corpus.

The State relies on the following facts, as found by this Court in affirming Herring's convictions and sentence:

The appellant, Ted Herring, was convicted of armed robbery and the first-degree murder of a convenience store clerk. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence. We have jurisdiction, [footnote omitted] and affirm the conviction and sentence of death.

The following are the relevant facts. Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was

interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor. Herring testified that this third statement was given only because the police were harassing him. He

admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's. At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating

> and two mitigating circumstances. The aggravating circumstances found by the trial judge were: **(1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery;** (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Herring v. State, 446 So. 2d 1049, 1051-53 (Fla. 1984). [emphasis added].[1] To the extent that Herring attempts, in footnote 1, to "incorporate by reference" everything that has previously been filed over the 20-year history of this case, that procedure, as attractive as it may be to Herring, is not available. It is axiomatic that the purpose of an appellate brief is to present legal authority in support of the party's position, not to "incorporate by reference" the entire record and expect this Court and the State to decipher what the opposing party's claims really are.

RESPONSE TO NATURE OF RELIEF SOUGHT

Herring is not entitled to relief based upon the *Apprendi/Ring* claim contained in the petition.

RESPONSE TO POST-CONVICTION PROCEDURAL HISTORY

The post-conviction procedural history set out on pages 4-11 of the petition is substantially correct. Since Herring filed this petition

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[1]On page 3, Herring improperly attempts to relitigate the "non-statutory aggravator" claim that was found procedurally barred in this Court's 1986 decision in this case. *Herring v. State,* 501 So. 2d, 1279 (Fla. 1986).

on June 23, 2003, he has filed an application for a certificate of appealability from the denial of his federal habeas corpus petition with the Eleventh Circuit Court of Appeals. On August 21, 2003, the Eleventh Circuit granted the certificate as to three claims.

On August 18, 2003, a case management conference was conducted by the Volusia County Circuit Court in Herring's successive Rule 3.851 motion in which he alleged that *Atkins v. Virginia,* 536 U.S. 304 (2002), prevents the State from carrying out his death sentence. The Circuit Court ruled that an evidentiary hearing will be conducted on the *Atkins* claim, and, at this juncture, it appears likely that the hearing will be scheduled for November 2003.

RESPONSE TO GROUNDS FOR RELIEF

I. THE *RING V. ARIZONA* DECISION DOES NOT AFFECT FLORIDA DEATH PENALTY LAW[2]

PRELIMINARY MATTERS

Herring claims that the United States Supreme Court's *Ring v. Arizona*, 536 U.S. 584 (2002), decision invalidates Florida's long-upheld capital sentencing structure. There are three fundamental reasons why the *Apprendi/Ring* argument fails: that claim is procedurally barred; Herring's death sentence is supported by aggravators that fall outside any interpretation of *Apprendi/Ring*; and, the statute under which Herring was sentenced to death provides that, upon **conviction** for capital murder, the maximum possible sentence is **death**, unlike the statute at issue in *Ring*.

It is true that *Ring* clarified the applicability of *Apprendi* to capital cases and partially overruled *Walton v. Arizona,* 497 U.S. 639 (1990). However, *Walton* had been decided based on a misunderstanding by the United States Supreme Court of Arizona

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[2] **Herring makes this claim despite the complete dissimilarity of the Florida and Arizona statutes, and despite the fact that no decisions of the United States Supreme Court upholding the constitutionality of the Florida death penalty statutes were invalidated, criticized, or otherwise called into question in *Ring*.**

death penalty law, a pivotal fact that is conspicuously absent from Herring's habeas petition.[3] The fundamental issue in *Ring*, and the rationale behind the result, clearly rests on the United States Supreme Court's **misinterpretation** of **Arizona's** capital sentencing statute. *Ring* at 603-5. However, *Ring* has no application to Florida's death sentencing scheme because the Court did **not** misinterpret **Florida** law. Herring's claim that Florida's statute fails because *Walton* has been overruled is predicated upon the false (and demonstrably incorrect) assertion that Florida and Arizona have functionally identical capital sentencing statutes. A cursory reading of *Ring* demonstrates that that is simply not true. Even ignoring the clear procedural bars and the total legal inapplicability of *Ring* to the facts of this case, the basic difference between Arizona and Florida law is dispositive of Herring's claims.

A. THE *RING* CLAIM IS NOT AVAILABLE TO HERRING BECAUSE IT IS PROCEDURALLY BARRED AND BECAUSE IT IS NOT RETROACTIVE TO HIS CASE

1. The *Apprendi/Ring* claim is procedurally barred.

Herring's reliance on *Ring* to support a Sixth Amendment claim is procedurally barred because it could have been but was not raised at trial and on direct appeal. The issue in *Ring* (which is merely an extension of *Apprendi*, anyway) is by no means new or novel -- that claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The "basis" for a claim that the sentence imposed in this case violated Herring's right to a jury trial has been available since he

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[3] The *Ring* Court determined that *Apprendi* and its impact on the prior decision in *Walton* required clarification (or correction of the Court's understanding) of the role of the jury in **Arizona** capital sentencing. Nothing in that decision changed the dynamic of Florida's capital sentencing scheme under *Apprendi* and *Ring*.

was sentenced to death -- he raised this claim after *Apprendi*[4] was decided, as did other Florida death row inmates, who have been raising the same claim since well prior to *Ring*. *See, Mills, infra.* There is nothing magical about an *Apprendi* claim, and, despite the pretensions of Herring's brief, *Ring* is nothing more than the application of *Apprendi* to capital cases. There is no justification for a departure by this Court from application of the well-settled State procedural bar rules, which this Court reaffirmed in *F.B. v. State*, 28 Fla. L. Weekly S624 (Fla., July 11, 2003).[5] The *Apprendi* claim is procedurally barred, and all relief should be denied on that basis. *See, e.g., Bundy v. State,* 538 So. 2d 445 (Fla. 1985).

2. The aggravators in Herring's case fall outside the scope of *Apprendi/Ring*, and reliance on those decisions is misplaced.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Herring's case. The prior violent felony aggravator and the during the course of a robbery aggravator, both of which are clearly applicable, fall outside of any conceivable interpretation of *Apprendi/Ring.*

Under the plain language of *Apprendi*, a prior violent felony conviction (which in this case was a prior robbery with a firearm conviction) is a fact which may be a basis to impose a sentence **higher than that authorized by the jury's verdict** without the need for

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[4] *Apprendi v. New Jersey,* 530 U.S. 466 (2000), was released on June 26, 2000. Any claims based on that case are untimely because they were not raised until more than two years after *Apprendi* was released. Rule 3.851(d), *Fla. R. Crim. P.*

[5] In *F.B. v. State*, this Court was explicit in holding that the only exception to the contemporaneous objection rule (which Herring clearly did not follow) is when the error is fundamental, which an *Apprendi/Ring* claim is not. In this case, there is no error at all under *Apprendi/Ring*, and, because that is so, the contemporaneous objection rule applies and should be enforced by this Court.

additional jury findings.[6] There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the "prior violent felony conviction" aggravator and the "during the commission of a felony" aggravator (which is supported by the contemporaneous armed robbery conviction) obviate any possible Sixth Amendment error. These two aggravating circumstances are outside of the *Apprendi/Ring* holding,[7] and, because that is so, those decisions are of no help to Herring. Herring's claim has no legal basis because *Apprendi/Ring* is inapplicable to the facts of this case as well as because a Florida **conviction** for murder made capital establishes that defendant's **eligibility** for a death sentence. Herring's attempt to bring his case under the *Apprendi/Ring* umbrella is an attempt to force the square peg of Florida's death penalty statute into the round hole of *Ring*. No relief is justified.

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[6] Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section B, *infra*. The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

[7] The *Apprendi* Court cited to *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact **(other than prior conviction)** that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Herring's prior violent felony conviction, and the murder during a robbery aggravator, are outside any possible (or reasonable) interpretation of *Apprendi* and *Ring*.

3. *Ring* is not retroactive to Herring's case.

In addition to being procedurally barred as well as legally and factually inapplicable, no court to consider the issue[8] has held ***Apprendi*** to be retroactive, and *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F. 3d 989 (10th Cir. 2002), *cert. and stay of execution denied,* 536 U.S. 974 (U.S. July 23, 2002)[9]; *In re Johnson,* 334 F. 3d 403 (5th Cir. 2003) ("Since the rule in *Ring* is essentially an application of *Apprendi*, logical consistency suggests that the rule announced in *Ring* is not retroactively available."). The First and Fourth District Courts of Appeal have held that *Apprendi* is not retroactive, as has the Kansas Supreme Court.[10] *Figarola v. State*, 841 So. 2d 576 (Fla. 4th DCA

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[8] *Coleman v. United States,* 329 F.3d 77 (2nd Cir. 2003); *Goode v. United States,* 305 F.3d 378, 382-85 (6th Cir. 2002); *United States v. Brown,* 305 F.3d 304, 307-10 (5th. Cir. 2002); *United States v. Wiseman,* 297 F.3d 975, (10th Cir. 2002); *United States v. Dowdy,* 2002 U.S. App. LEXIS 12559 (9th Cir. June 20, 2002); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Mora,* 293 F.3d 1213, 1218-19 (10th Cir. 2002); *Hines v. United States,* 282 F.3d 1002 (8th Cir. 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Forbes v. United States,* 262 F.3d 143, 144 (2nd Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Sanders v. United States,* 247 F.3d 139, 151 (4th Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000).

[9] The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

[10] The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 2001 WL 996300 (Ala. Crim. App. 2001). The Minnesota Court of Appeals refused to apply *Apprendi* retroactively, holding that it was not a watershed rule of criminal procedure, and that the rule did nothing to enhance the accuracy of a criminal conviction. *Meemken v. State*, 2003 Minn. App. LEXIS 661 (June 3, 2003). The Missouri Supreme Court seems to be the only court that has held that *Ring* is retroactively applicable. *State v. Whitfield*, 2003 Mo. LEXIS 105 (Mo. S.Ct. June 17, 2003). The retroactive application of *Ring* is inconsistent and irreconcilable with the same Court's holding that *Apprendi* is **not** retroactive. *State ex. rel. Nixon v. Sprick*, 59 S.W. 3d 515 (Mo.

2003); *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002) (certifying question); *Whisler v. State*, 36 P.3d 290 (Kan. 2001).[11] The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive, *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), and, because that is the law, it is wholly illogical to claim that a wholly procedural ruling like *Apprendi* or *Ring* would be treated differently. It is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi* or *Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra. Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance." Finally, the Eleventh Circuit Court of Appeals has expressly held, in a Florida death penalty case, that *Ring* is **not** retroactively applicable. *Turner v. Crosby*, 16 Fla. L. Weekly Fed C926 (11th Cir. July 29, 2003). This Court should not hold otherwise.

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Herring's death sentence that "obvious injustice" exists. *New v. State,* 807 So. 2d 52 (Fla. 2001), *cert. denied,* 536 U.S. 942 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Neither *Apprendi* nor *Ring*

2001). The conflicting results reached by the Missouri Supreme Court suggest that reliance on *Whitfield* would be ill-advised. The Nebraska Supreme Court has held that *Ring* is not retroactively applicable. *State v. Lotter*, 2003 Neb. LEXIS 111 (July 11, 2003).

[11] An *Apprendi* claim is not "plain error,"either. *United States v. Cotton*, 535 U.S. 625 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

meet that standard, either.

4. *The Apprendi/Ring* claim is meritless.

Finally, without waiving the foregoing procedural defenses, the claim raised by Herring has been expressly rejected by this Court. *See McCoy v. State*, 2003 WL 21982066 (Fla. Aug. 21, 2003); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003), *petition for cert. filed*, July 28, 2003, No. 03-5620; *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003)("*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), *petition for cert. filed*, July 28, 2003, No. 03-5621; *Conahan v. State*, 844 So. 2d 629 (Fla. 2003), *petition for cert. filed*, July 3, 2003, No. 03-5209; *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 and *King v. Moore*, 831 So. 2d 143 to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003), *petition for cert filed*, June 12, 2003, No. 03-5160; *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003), *petition for cert. filed*, August 8, 2003, No. 03-5860; *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other *Apprendi* arguments."); *Fotopoulos v. State/Moore*, 838 So. 2d 1122 (Fla. 2003); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *petition for cert. filed*, May 9, 2003, No. 02-10848; *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003), *petition for cert. filed*, April 24, 2003, No. 02-10379; *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002); *Pace v. State/Crosby*, 28 Fla. L. Weekly S415 (Fla. May 22, 2003); *Jones v. State/Crosby*, 28 Fla. L. Weekly S395 (Fla. May 8, 2003); *Marquard v. State/Moore*, 28 Fla. L. Weekly S389, 27 Fla. L. Weekly S973, 978, n. 12 (Fla. Nov. 21, 2002); *Chandler v. State*, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003), *petition for cert. filed*, July 30, 2003, No. 03-5708. This Court should, in addition to denying relief on

procedural grounds, continue to follow this unbroken line of authority by denying relief on the merits as an alternative and secondary basis for the denial of relief.

B. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS THIS COURT HAS HELD.[12]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statutes. The United States Supreme Court failed to recognize that distinction in *Walton*, but recognized and corrected its misinterpretation of Arizona law in *Ring*. Because *Walton* was based on an incorrect interpretation of Arizona law, the suggestion that Florida's statute is invalid because *Walton* has been overruled is spurious. Since *Ring* corrected the Court's error as to Arizona law, no good faith argument can be made that Florida's statute is anything like Arizona's, especially in light of **this** Court's clear interpretation of Florida law (which is clearly not like Arizona law). The *Ring* Court stated:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** *See* 200 Ariz., at 279, 25 P.3d, at 1151 (*citing Ariz. Rev. Stat.* § 13- 703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13- 703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]

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[12] In *Mills v. Moore, infra,* the Florida Supreme Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona's.

FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...."

FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority

> to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 536 U.S. at 597. [emphasis added]. Under Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings, and requires the determination that an aggravating factor exists. Florida law is different.[13]

1. In Florida, death is the maximum sentence for capital murder.

"[T]he legislature, and not the judiciary determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*,[14] concluded that the maximum sentence to which a Florida capital

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[13] The claim that the indictment must contain the aggravators and that the jury must find them unanimously has been repeatedly rejected by this Court. *See, Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994); *Fotopoulos v. State,* 608 So. 2d 784, 794 n.7 (Fla. 1992); *Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983). Aggravators must, of course, be proven beyond a reasonable doubt.

[14] This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

defendant is subject following conviction for capital murder is death.[15] *Apprendi* led to no change of any sort, by either the Legislature or this Court.[16]

2. Death eligibility in Florida is determined at the guilt stage.

In Florida, the determination of "**death-eligibility**" is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Herring's *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the offense of capital murder -- the penalty phase proceeding (which **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from

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[15] "**The maximum possible penalty described in the capital sentencing scheme is clearly death.**" *Mills, supra. See, e.g., Lightbourne v. State,* 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State,* 399 So. 2d 964 (Fla. 1981); *Mills v. Moore,* 786 So. 2d 532, 537-8 (Fla. 2001); *Porter v. Moore,* 28 Fla. L. Weekly S33 (Fla. June 20, 2002); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[16] Whatever criticisms Herring may direct against the *Mills* decision cannot alter the fundamental fact that this Court's explanation of Florida's capital sentencing statutes has not changed. By correctly stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying the applicable cases under Florida law as they applied to the statute.

Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder, and Section 775.082 establishes that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as "capital" in its criminal statutes.** There is no constitutional defect with Florida's statute.

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring did not disturb any prior United States Supreme Court decisions upholding the constitutionality of Florida's death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida,* 463 U.S. 939 (1983), and *Dobbert v. Florida,* 432 U.S. 282 (1977). And, as **this** Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore,* 786 So. 2d 532, 537(Fla. 2001).[17]

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Herring's claims. The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida's capital sentencing scheme, and expressly declined to do so. *Cf. Hodges v. Florida*, 506 U.S. 803 (1992), wherein the United States Supreme Court vacated the Florida Supreme Court's opinion for further consideration in light of *Espinosa v.*

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[17] To rule in Herring's favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock,* 474 U.S. 376 (1986), *Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra,* and *Gardner v. Florida,* 430 U.S. 349 (1977).

Florida, 505 U.S. 1079 (1992).

On June 28, 2002, the United States Supreme Court remanded four cases in light of *Ring*: *Harrod v. Arizona*, 536 U.S. 953 (2002); *Pandeli v. Arizona*, 536 U.S. 953 (2002); *Sansing v. Arizona*, 536 U.S. 954 (2002); and *Allen v. United States*, 536 U.S. 953 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona, supra*. However, the Court **denied** certiorari in seven cases raising the "*Ring*" issue: *Brown v. Alabama*, 536 U.S. 964 (2002); *Mann v. Florida*, 536 U.S. 962 (2002); *King v. Florida*, 536 U.S. 962 (2002); *Bottoson v. Florida*, 536 U.S. 962 (2002); *Card v. Florida*, 536 U.S. 963 (2002); *Hertz v. Florida*, 536 U.S. 963 (2002); and *Looney v. Florida*, 536 U.S. 966 (2002). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. Further, and of even greater significance, the United States Supreme Court denied a stay of execution July 23, 2002, in an Oklahoma case which raised a *Ring* claim. *See, Cannon v. Oklahoma*, 536 U.S. 974 (2002). This Court should not accept Herring's invitation to "review" the decisions of the United States Supreme Court.

C. *RING* DOES NOT REQUIRE JURY SENTENCING, AND THIS COURT SHOULD NOT ACCEPT HERRING'S INVITATION TO EXTEND *RING*.

Herring's argument that *Ring* requires jury sentencing is incorrect -- that is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component) with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring*. In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require

> it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible, which a Florida jury does at the guilt stage proceedings.

1. The death-eligibility determination is made at the guilt phase of a capital trial.

Florida law places the death-eligibility determination at the guilt phase of a capital trial -- that necessarily satisfies the *Ring* "death eligibility" component. The jury (under *Ring*) only has to make the determination of **death eligibility** -- the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring, supra ("*What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring). When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor," because Arizona (unlike Florida) makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Tuilaepa v. California,* 512 U.S. 967, 972 (1994).[18] *See also, Zant v. Stephens,*

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[18] California law places the eligibility determination at the guilt phase. *Tuilaepa, supra,* at 969 ("[T]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *People v. Ochoa,* 26 Cal. 4th 398, 453-54, 28 P.3d 78, 110 Cal.

462 U.S. 862, 874-78 (1983). The constitution is satisfied when a Florida defendant is **convicted** of an offense for which death is the maximum sentence exposure because the conviction determines the fact of "eligibility for death."

2. Florida law is different from Arizona's.

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted **by the jury's conviction alone** is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).[19] Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey,* 530 U.S. at 462. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin*

Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

[19] This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton*. *Ring, supra.* Because the United States Supreme Court's description of Arizona law was incorrect in *Walton* and *Apprendi*, Herring's efforts to argue that Florida law is "like the Arizona statute in *Walton*" are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is based upon a false premise.

v. Florida, 490 U.S. 638, 640-41 (1989). [emphasis added].[20] And, as Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at all**:

> Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor [in context, death-eligibility factor] in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."

Ring, supra. Florida's capital sentencing scheme comports with those constitutional requirements.

3. Florida provides additional Eighth Amendment protection at the sentencing phase.

The Florida capital sentencing statue provides for the jury's participation.[21] The statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death under both the Sixth and Eighth Amendments. *See, Spaziano v. Florida*, 468 U.S. at 464-5. Subsequently, the Court emphasized that a Florida jury's role is so vital to the sentencing process that the jury is a "co-sentencer." *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority.

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[20] "The Constitution permits the trial judge, acting alone, to impose a capital sentence." *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.*

[21] Under the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. The penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

> . . . We merely hold that, **if a weighing State decides to place capital sentencing authority in two actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].

4. The aggravators need not be set out in the indictment, nor must the sentence stage (selection stage) jury unanimously recommend a sentence.

Herring's claims that a death sentence requires juror unanimity, the charging of the aggravators in the indictment, or special jury verdicts are unsupported by *Ring*. These issues are **expressly** not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider the Court's well-established rejection of these claims. *Sweet v. State*, 822 So. 2d 1269 (Fla. 2002) (prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)); *Cox v. State*, 819 So. 2d 705, 724 at n. 17 (Fla. 2002) (same), *cert. denied*, 537 U.S. 1120 (2003).

Herring's argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court. *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied*, 536 U.S. 966 (2002). *See, Way v. State*, 760 So. 2d 903, 924 (Fla. 2000), *cert. denied*, 531 U.S.1155 (2001) (Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). And, even before *Apprendi*, this Court consistently held that a jury may recommend a death sentence on simple majority vote. *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994) (reaffirming *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(advisory recommendation need not be unanimous). After *Apprendi*, the Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n.13 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Brown v.*

Moore, 800 So.2d 223 (Fla. 2001).

The United States Supreme Court has held that a finding of guilt does not need to be unanimous.[22] *Cf. Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Jurors do not have to agree on the particular aggravators; are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631 (1991); and may not be required to unanimously find mitigation. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). *Ring* simply affirms the distinction between "sentencing factors" and "elements" of an offense which have long been recognized. *See Ring* at 597 n.4.; *Harris v. United States*, 536 U.S. 545 (2002). And, to the extent that Herring claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of Federal cases (with their wholly different procedural requirements) to Florida's capital sentencing scheme.[23]

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by this Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not change the Eighth Amendment requirement of channeling of the jury's discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial.[24] Florida law over-meets the requirements of the Eighth

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[22] *See also, People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as to existence of aggravators, weight given to them, or appropriateness of a sentence of death).

[23] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona, supra,* at n.4, *citing, Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California,* 110 U.S. 516 (1884) (holding that, in capital cases, the States are not required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

[24] The most that can be said for the votes against a death sentence are that they amount to what can be called a "jury pardon". *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992). The jury's vote reflects considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the

Amendment, and satisfies the Sixth Amendment, as well. *See Pulley v. Harris, supra.*

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. And, as Justice Scalia commented, "those States that leave the ultimate life-or-death decision to the judge **may continue to do so**." *Ring, supra.*

The United States Supreme Court's holding in *Clemons v. Mississippi* is dispositive:

> **Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.**

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990).[25]

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aggravating circumstances. The only conclusion that can be drawn from the jury's sentencing vote is that those jurors thought that life was a more appropriate sentence.

[25]To the extent that Herring claims that an "uncharged aggravator" was relied on by the trial judge, that claim is procedurally barred and unworthy of further discussion. To the extent that Herring challenges various jury instructions, that claim is time barred and, likewise, deserves no further comment. Finally, the argument that *Ring* means that the "striking of the cold, calculated and premeditated aggravator" requires reversal is spurious. That claim is likewise untimely, because it could have been raised long ago. *Ring* created no new "right", nor did it alter the holding in *Clemons,* which clearly permits the procedure followed by this Court in this case.

CONCLUSION

Based upon the arguments and authorities set out herein, the Respondent respectfully requests that this Court deny the *Apprendi/Ring* claim on procedural bar grounds, and, in the alternative, for lack of merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Jon M. Wilson,** Foley & Lardner, 111 N. Orange Ave., Post Office Box 2193, Orlando, Florida 32802-2193, **Sherman & Sterling,** LLP, 599 Lexington Ave., New York, New York 10022, **Gurney & Handley, PA,** 225 East Robinson St., Suite 450, Orlando, Florida 32807, Attorneys for Petitioner Ted Herring, on this ___ day of August, 2003.

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Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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